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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES,
Petitioner,

v.

ESQUIRE, INC.,
Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court is reported at 55 F. Supp. 1015. The opinion of the Court of Appeals for the District of Columbia is reported at 151 F. 2d 49.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347).

STATUTE INVOLVED

The applicable sections of the Postal Law relating to second-class mail read, 20 Stat. 359 (39 U. S. C.):

> "§ 224. Second-class matter. Mailable matter of the second class shall embrace all newspapers and

other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections 225 and 226 of this title.

* * * * * *

§ 226. Same; conditions admitting publications to. Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. * * * Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." (Underscoring added.)

The above underscored words of the Fourth Condition are those with which we are here concerned.

STATEMENT

The Brief of the Postmaster General is predicated entirely upon the erroneous proposition that the question posed by the instant case is whether the Postmaster General has the right to determine whether a periodical complies with the Fourth Condition.

Actually, the basic issue is whether the Fourth Condition can be construed to authorize the Postmaster General to withhold second-class postal rates from a periodical upon the ground that that periodical does not in his judgment make an affirmative contribution to the public good.

The foundation of the revocation order (held unlawful by the Court below) is the Postmaster General's conviction that:

> "Publication to enjoy these unique mail privileges and special protections is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare." (Revocation Order, R. 1863).

Thus the order on its face discloses that it is based upon the Postmaster General's personal evaluation of whether the content of Esquire Magazine contributes to the public good.

At the outset, therefore, it should be made clear that the issue is not whether the Postmaster General may determine administratively that a periodical is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry"[1] but, rather, whether these words

[1] 20 Stat. 359 (39 U. S. C. 226).

can be given a completely novel construction so as to permit the Postmaster General to deny second-class rates on the ground that the content of a periodical is not *good* information or *good* literature or *good* art.

STATEMENT OF CASE

(a) The Citation and Post Office Department Hearings.

Respondent is the publisher of the monthly periodical, Esquire Magazine. The publication conforms to the practice of most present day magazines of presenting stories, articles, stage and screen departments, pictorial features, cartoons, jokes, correspondence with the editors and advertising.

On September 11, 1943, petitioner caused a citation to be issued requiring respondent to show cause why its second-class mailing rights in respect of Esquire Magazine should not be revoked (R. 1-2, 6). A fair reading of the citation, as amended, shows that it was based upon allegations that certain specified material contained in eleven issues of the magazines[2] was non-mailable because obscene within the meaning of the so-called obscenity statute.[3] Esquire denied the charge and, thereafter, hearings were held before a Hearing Board appointed by the Postmaster General. During the second week of the hearings a new charge, the only one with which we are now concerned, was introduced. That charge in substance was that even if the magazine was not obscene, and there-

[2] The issues of January to November, 1943, inclusive (Dept. Ex's. 1-11 in Post Office Dept., R. 46).

[3] 35 Stat. 1129 (18 U. S. C. 334).

fore was mailable, it nevertheless was not entitled to second-class entry since it did not comply with the Fourth Condition i.e., it was not "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry" (R. 601-7). Although it is obvious on the face of things that the content of the magazine comes within these categories the new charge was promptly met and disposed of by expert witnesses, who analyzed the entire content of the magazine from the standpoint of such categories and compared its content and editorial formula with that of other leading magazines (See, for example, R. 881, 1191-4, 1137, 1151-2).

(b) The Hearing Board Recommendations and Findings.

On November 11, 1943, after the hearings had been completed, the Hearing Board filed its Recommendations that the proceeding "be dismissed and that the second-class entry of the magazine Esquire be continued in full force and effect" (R. 1839). At the same time the Board filed its Findings (1) that the charge of obscenity "has not been supported and proved in fact or in law" and (2) that the publication "has not failed to comply" with the Fourth Condition of the statute (R. 1838-9). One member of the Hearing Board dissented on the obscenity issue, solely on the ground that he regarded a one-page item (out of 1972 pages in the 11 cited issues) as obscene, that the entire issue containing such item was therefore non-mailable, and that Esquire's second-class mailing rights should be revoked because its regularity of issuance was thereby interrupted (R. 1851-5).

On November 22, 1943, at the Postmaster General's suggestion, Walter Myers, Chairman of the Hearing Board, made a "Supplementary Recommendation" (R. 1892) in which he again advised that obscenity had not been established, stated that an attempt to withhold second-class rates from an otherwise mailable periodical such as Esquire on an alleged violation of the Fourth Condition would be contrary to law, and suggested that the Postmaster General might recommend new legislation to Congress as a possible means of withholding second-class rates from publications which he might regard as coarse and objectionable (Pl.'s Ex. 25 for Iden. in Dist. Ct., R. 1949).

(c) The Revocation Order of the Postmaster General.

On December 30, 1943, the Postmaster General handed down his order revoking Esquire's second-class mailing rights (R. 1856-65). The order disregarded both the Findings and Recommendations of the Hearing Board and the Supplementary Recommendation of Chairman Myers.

The revocation order, while at times lacking in consistency and on the whole being self-serving, unmistakably shows that the Postmaster General determined to revoke Esquire's second-class privileges, and then made an unprecedented interpretation of the Fourth Condition as a plausible reason to support his conclusion. After referring to the citation (R. 1856), the order asserts that since the proceedings involve only the second-class mail, no question of the right of freedom of the press is presented (R. 1857). The order goes on to emphasize the so-called "unique" characteristics of second-class rates and classifies them as "true privileges," concluding that Congress enacted the Fourth Condition to insure that publications make a special

contribution to the public welfare in order to obtain them (R. 1858-9). The order then refers to an alleged lack of consistency and uniformity in prior administrative practice and interpretation, asserts that in the first instance it is for the courts to say what the statute means and states that no matter what result is reached by the courts, Congress should set up more definite standards and rigid limitations to govern eligibility to the second-class (R. 1861-2). The order then points out that the Postmaster General should not be hesitant to expose the existing situation to the public eye nor reluctant to determine the matter in such a way that all phases of it "may be fully considered and decided by a court of competent jurisdiction" (R. 1862). The order then states:

> "The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry'.
>
> "Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.
>
> "When, however, they become a dominant and systematic feature they most certainly cannot be said

to be for the public good, and a publication which uses them in that manner is not making the 'special contribution to the public welfare' which Congress intended by the Fourth condition.

"A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare." (R. 1862-3).

The order concludes that the magazine does not meet the test thus laid down and revokes the second-class entry. It provides that it shall not become effective for 60 days so as to permit an appeal to a court to fully review and settle the matter (R. 1865).

(d) The Proceedings in the District Court.

On January 21, 1944, Esquire commenced an action in the District Court of Columbia to enjoin the revocation order. After the commencement of suit the Postmaster General agreed to continue to mail Esquire at second-class rates until the final determination of the suit on condition, however, that if it should finally be decided that Esquire is not entitled to second-class rates Esquire will pay the difference between second and fourth-class rates for the period from February 28, 1944 to the date of such final decision (R. 1885-6). During pretrial proceedings in the District Court, the Postmaster General stipulated that he would not contend that the magazine violated the obscenity statute, agreed that it was mailable, and that the revocation order would cause irreparable injury (R. 1891-3).

Upon the trial in the District Court, the record of the proceedings before the Post Office Department was intro-

duced and additional evidence was received to establish that the occasion of the instant case was the first in 65 years of administrative practice when a Postmaster General made a qualitative evaluation of the content of a periodical as a condition of entry to second-class mail.

On July 15, 1945, the District Court handed down its opinion, sustaining the Postmaster General (R. 1963-75). The opinion discussed at length the Court's impressions about the educational environment of members of Congress at the time of the enactment of the Fourth Condition (March 3, 1879), and concluded that that was sufficient warrant for the Postmaster General to hold that "the literature" referred to in the statute meant "literature of desirable type of an educational value" (R. 1969). The opinion also asserted that Esquire was not "deprived of property" since it could still mail its magazine in one of the other classes, although admittedly at the additional cost of $500,000 per year (R. 1972). On the matter of freedom of the press, the opinion stated that there was no abridgement of Esquire's constitutional rights because if the Postmaster General was arbitrary, his action was subject to review by the courts, that the Postmaster General was also subject to the will of the President, and that, in any event, if the Postmaster General generally misinterpreted the law, "Congress can rewrite the Act" (R. 1973). The opinion concluded that the Postmaster General's action was taken in good faith and was not arbitrary and was, therefore, conclusive on the Court.

(e) The Decision of the Court Below.

On June 4, 1945, the Court of Appeals for the District of Columbia unanimously reversed the judgment of the District Court (R. 1987-95).

The question presented to and passed upon by the Court of Appeals was whether the Fourth Condition could be construed, as the Postmaster General in effect contended, to enable him to measure all periodicals enjoying second-class rates by his personal standards and moral yardstick and if he found that any of them did not measure up to his test of "positive duty to contribute to the public good and public welfare," to withhold the second-class rates and thus deny them any practicable use of the mails.

The Court of Appeals held that the Fourth Condition cannot be so construed. The essence of the holding is contained in the Court's words that "It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional" (R. 1988).

THE MAGAZINE

The magazine, 11 issues of which were the subject of the Postmaster General's attack, in the words of the Court below:

> "is a well-known magazine of general circulation. It contains stories, articles, literary and dramatic reviews. Its contributors include distinguished authors, clergymen and professors in our best educational institutions" (R. 1987).

It can be readily seen that the content of the magazine comes within the categories of the Fourth Condition, "information of a public character", "literature", "arts", "sciences" or "special industry", by simply referring to the Table of Contents which appears at page 5 of each of the cited issues.

The 11 issues in question follow a rather standard editorial pattern, each containing a number of articles of current interest, short stories, articles on sports and interesting personalities, one feature on men's clothing, regular departments on Books, the Theatre, etc., and pictorial features including paintings, water colors, photographs and drawings. Among the better known literary contributors are, in alphabetical order: Sholem Asch, Ivan Bunin, Theodore Dreiser, John Dos Passos, Lord Dunsany, Havelock Ellis, Lion Feuchtwanger, F. Scott Fitzgerald, Maxim Gorky, Ernest Hemingway, D. H. Lawrence, Maurice Maeterlinck, Thomas Mann, Andrew Marquis, Franz Molnar, Luigi Pirandello, John Steinbeck, Jacob Wassermann, Thomas Wolfe and Arnold Zweig. The art contributors include: George Bellows, Thomas Benton, Alexander Brook, James Chapin, John Steuart Curry, Salvador Dali, William J. Glackens, George Grosz, Rockwell Kent, George Luks, Reginald Marsh, Henry Varnum Poor, Diego Rivera, Paul Sample, John Sloan and Eugene Speicher.

Tabulating the text features of the 11 issues, there are:

85 *full-length articles* on subjects of current interest, the greater number of which concerned the war effort, including such subjects as The Coming Battle of Germany (Jan., p. 109); The Future of Air Power (Jan., p. 77); Technique of bombing (Feb., p. 57); Germany's preparations for the use of poison gas (Mar., p. 37); Submarine warfare (May, p. 51); Britain's policies as to colonial empire (June, p. 27); Navy training films (Sept., p. 69); and Rocket warfare (Oct., p. 59);

59 *short articles* on a great variety of subjects such as self-portraits and self-interviews in which men

prominent in various fields express their views: Editor William Allen White (Jan., p. 140); Secretary Harold L. Ickes (Feb., p. 101); Senator Harry Truman (Mar., p. 96); Senator Arthur Capper (Apr., p. 105); Senator Claude Pepper (May, p. 116); Senator Guy M. Gillette (June, p. 122); and Senator Robert F. Wagner (July, p. 177); a movie star's article about his dog (May, p. 138); an opera singer's ideas on entertainment (May, p. 132); survey of the most popular campus swing music (May, p. 172); and how to grow Victory gardens in the city (May, p. 135);

73 fiction short stories;

57 sports articles or stories (including the regular sports poll on questions of current interest in sports);

22 articles on personalities such as Admiral William F. Halsey, Jr.; Bernard Baruch; Lt. William Eddy, of the U. S. Navy; Russia's Marshall Timoshenko; France's Henry Giraud; Nazi Admiral Karl Doenitz; Damon Runyon; Leo McCarey; and motion picture director, Walt Disney;

and in each issue regularly recurring departments on "*Books*" (written by the late William Lyon Phelps); on the "*Theatre*" (by George Jean Nathan); on what to eat, drink and wear ("*Edibles*", "*Potables*" and "*Wearables*"); on the "*Lively Arts*" (Gilbert Seldes acting as a roving reporter); on "*Correspondence*" (The Sound and the Fury—the usual column of letters from readers to the editor); on "*Contributors*" (a who's who on new contributors to each issue); and a humor department at first called "*Potpourri*" (Ad Libbing with Esquire) and later "*Camp Humor*" (Goldbricking with Esquire).

Tabulating the *pictorial features* of the 11 issues, we find the following:

24 war action paintings by John Falter, Alexander Leydenfrost and William Pachner;

11 color photographs of champion dogs by Henry Waxman, and water colors or etchings of game birds by Walter Bohl;

11 sets of paintings, prints and drawings reproduced through the courtesy of the Associated American Artists; The Cincinnati Art Museum; The Knoedler Art Galleries; The Gallery of Modern Art; The Arthur Kaufman Galleries; The Perls Galleries; the André Seligmann Galleries; and the Schoeneman Galleries;

27 color photographs of Hollywood stars and prospective stars;

14 color photographs of performers from Broadway plays, musical shows, the circus and night clubs taken by such recognized photographers as Anton Bruehl, George Serebrykoff and Jon Abbott;

27 paintings or drawings with a fashion treatment or emphasis;

23 paintings of the so-called Varga girl; and

7 sets of drawings of current war interest by Paul C. Maxwell in a serious vein, and by Derso and Kelen with a satirical approach to international politics.

The two foregoing lists tabulate the main features of the magazine although there are in addition a number of cartoons and jokes, for the most part consisting of filler material.

STIPULATED AND CONCEDED MATTERS

All issues other than the construction and application of the words of the Fourth Condition, "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry," have been stipulated out of the case. The sole basis for the original attack against Esquire, i.e., non-mailability because of obscenity, now is not even in the case for, as pointed out above, the Postmaster-General agreed during pretrial proceedings in the District Court that he does not defend his order on the ground that the magazine violates the obscenity statute or that it is non-mailable under that or any other statute (R. 1891-3). It is also conceded that the magazine satisfies the other conditions of Section 226 of the Postal Law viz., that it is a periodical, that it has a legitimate list of subscribers, and that it is not designed primarily for advertising, or for free circulation, or for circulation at nominal rates (R. 26, 1976). Finally, it is uncontradicted that the withholding of second-class rates would result in an additional mailing expense of $500,000 per year (R. 1972) and the Postmaster General has stipulated that his revocation order will cause irreparable injury to Esquire (R. 1892).

OUTLINE OF ARGUMENT

The contentions of respondent upon this appeal are:

(1) that in making the revocation order the Postmaster General unlawfully construed the Fourth Condition so as to add the unprecedented requirement that periodicals must make an affirmative contribution to the public good according to his own personal standards;

(2) that if the statute were interpreted according to the contentions of the Postmaster General, it would be unconstitutional (a) because it would abridge the freedom of the press guaranteed by the First Amendment, and (b) because it would involve an improper delegation of power; and

(3) that, in any event, the Postmaster General's revocation order is arbitrary, capricious and clearly wrong and results in unjust discrimination.

POINT I

IN MAKING THE REVOCATION ORDER THE POSTMASTER GENERAL UNLAWFULLY CONSTRUED THE FOURTH CONDITION SO AS TO ADD THE REQUIREMENT THAT PERIODICALS MUST MAKE AN AFFIRMATIVE CONTRIBUTION TO THE PUBLIC GOOD ACCORDING TO HIS OWN PERSONAL STANDARDS.

(a) The Postmaster General's Construction of the Fourth Condition Necessarily Involves a Review of the Content of the Publication and an Evaluation of its Merit According to His Own Views.

One of the fundamental fallacies of the Postmaster General's argument which pervades his entire brief on the instant appeal is that he fails to recognize that his construction of the Fourth Condition necessarily involves a personal evaluation on his part of the content of Esquire. In making the revocation order, the ultimate conclusion of the Postmaster General is that Esquire does not disseminate "information of a public character" and is not devoted to "literature", "the sciences", "arts" or "special industry"

but that conclusion, as is established beyond question by the record in the case, is reached only upon a primary determination that Esquire does not comply because the Postmaster General does not like some of the public information, literature, or art which it publishes. In other words, he has interpreted the words "public information", "literature" and "art" to be synonymous with "public information, literature and art which, in my opinion, make an affirmative contribution to the public good".

The Postmaster General's revocation order itself makes this plain for it discloses that he has predicated his determination of non-compliance with the Fourth Condition upon the ground that he does not believe Esquire is contributing to the public good and the public welfare (R. 1863). The revocation order states that the Postmaster General's complaint is that some of the content of Esquire is, in his opinion, indecent, vulgar, and risque and that while he is uncertain as to the level of good or bad taste which they attain, his conclusion is that they are not information of a public character, or literature or art (R. 1864). The one unmistakable feature of the order is that the Postmaster General has viewed the content of Esquire with relation to his concepts of contribution to the public welfare and has asserted that some of the items contained in the magazine fall within an "obscure and treacherous borderland zone" so as not to be information of a public character or devoted to literature or art. (R. 1863).

A simple test to show that the Postmaster General's determination involved his personal evaluation of the content of Esquire is derived from a consideration of the charges made in the case and the Postmaster General's decision with respect to them. A substantial number of the items

complained of by the Postmaster General[3] are articles, stories and poems. To illustrate, one of the items complained of is an article by Gilbert Seldes appearing on page 83 of the January, 1943 issue criticizing a Broadway musical comedy as being nothing more than a burlesque show. Other examples include an article by H. B. Lawrenson on page 30 of the February, 1943 issue dealing with a legendary character of the United States Merchant Marine; an article by Edmund Gilligan in the April, 1943 issue describing arraignment proceedings in a magistrate's court; an article by Paul Gallico in the May, 1943 issue regarding as dull and puerile the trend of theatrical productions toward burlesque; an article by David Emory in the August, 1943 issue deploring the ideas of an English professor advocating plural marriage; and poems such as the one entitled "Benedicts, Awake!" on page 45 of the January, 1943 issue.

It is idle for the Postmaster General or anyone else to contend that such theatrical reviews, articles, stories and poems are not information of a public character, or devoted to literature or art. In order to exclude them from these categories, the Postmaster General has to interject his personal evaluation, which he has expressed in terms of contribution to the public welfare in the revocation order. In other words the Postmaster General's application of the Fourth Condition results in his exclusion of a theatrical review or

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[3] The material originally complained of was listed in the original and amended citations and consisted of items on 32 pages of 11 separate issues (R. 3-4, 8-10). In addition, by way of further particularization of the charges in answer to Esquire's request that every item against which the citation was in any way directed be specified, further items on 54 pages were specified (R. 31-33), so that the entire matter against which evidence was made consists of items on 80 pages (out of a total of 197 pages).

a poem from the field of public information, literature or art only because he believes that they are in bad taste. The theatrical criticism of Gilbert Seldes is removed, under the Postmaster General's test, from the field of public information, literature or art to an obscure borderland because it discusses a burlesque show. The poem "Benedicts, Awake!" loses its literary and artistic character because the Postmaster General ascribes to it an air of indelicacy.

The same considerations apply to cartoons, jokes and pictures. The Postmaster General's brief erroneously suggests that Esquire admits that such items are not information of a public character, or devoted to literature or art. We do contend that they come within these categories and the instant record clearly establishes that many of such items, appearing not only in Esquire but in other periodicals, are admittedly in compliance with the Fourth Condition so long as they are unobjectionable to the Postmaster General. The revocation order itself concedes that humorous periodicals devoted primarily to entertainment are not to be excluded from the second-class (R. 1860). It follows that the Postmaster General cannot assert that jokes, cartoons or pictures as such are not public information, literature or art. He is driven to the position that items of that class which he complains of in Esquire are not within those categories because he regards them as coarse or indelicate.

We submit that the record establishes beyond question that the Postmaster General's construction of the Fourth Condition results in an additional requirement that the publication not only contain public information, literature and art but that the public information, literature and art must be of a calibre as meets his personal test of contribution to the public good and welfare.

(b) The Circumstances Surrounding the Enactment of the Fourth Condition Show that it was Never Designed to Give to the Postmaster General the Power which he has Asserted here.

The Fourth Condition was enacted when the classification of mailable matter was revised on March 3, 1879. Except for minor amendments not significant here, that Postal Law is still in effect. For several years prior to the passage of the Act in 1879, mailable matter had been divided into 3 classes: letters in the first class, printed periodicals in the second class, and other printed material and miscellaneous articles in the third class. During this period, there was a growing practice on the part of many private enterprises of taking advantage of the more favorable second-class rates solely for advertising purposes. An amendment of July 12, 1870 sought to correct this situation by raising the postal rates on periodicals devoted primarily to advertising.[5] It appears that the amendment did not have the desired result and one of the primary objects of the act of 1879 was to remedy this defect. The act of 1879 provided for the classification of mailable matter into four rather than three classes, the new third and fourth classes taking the place of the former third class. It continued newspapers and magazines in the second class, but specifically excluded therefrom publications originated and published primarily for advertising purposes. It is in connection with this feature of the act that the words of the Fourth Condition came into being and all of the evidence establishes that the words were never devised to give powers of censorship to the Postmaster General as

[5]Chap. 71 of Laws of 1863 (12 Stat. 701).
[6]Chap. 179 of Laws of 1876 (19 Stat. 78).

he now contends. On the contrary, it is abundantly clear that the Fourth Condition was formulated solely in an effort to exclude private advertising sheets and pamphlets from the second class. To accomplish this result Congress undertook affirmatively to define eligible periodicals so as to include all those which were in the commonly accepted sense recognized as such. And to make doubly sure that purely advertising material was not included, Congress added a specific negative proviso, in the final sentence of the section that publications "designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates" were not entitled to second-class rates.

These circumstances make it clear why Congress used the broad, all-inclusive terms, "public information," "literature," "arts," "sciences" and "special industry" in describing the matter which qualified for the second class. Except for advertising publications, Congress was not attempting to exclude any periodical publication from the second-class, much less clothe the Postmaster General with the power generally to supervise the tastes of the reading public of the country.[7] As we shall discuss, no Postmaster General has ever suggested, until the instant case, that the words of the Fourth Condition could be construed except in

[7] The passage of an amendment to admit to the second class periodical publications of benevolent and fraternal societies, unions, state boards of health, etc. (37 Stat. 550, 39 U. S. C. 229) does not support any inference that the Fourth Condition contemplated an evaluation of content (See Pet. Br. p. 16). The purpose of that amendment was to give second-class rates to such publications despite the fact that they did not have a legitimate list of paying subscribers. See Letter of Postmaster General of June 16, 1910, Congressional Record, 61st Congress, Second Session, p. 9033; Senate Report 1242, part 2, "Increase of Postage Upon Advertisements in Certain Periodicals", 61st Congress, Third Session.

a manner as would include all matter which could possibly be the subject of periodical publication.

It is to be noted that in enacting the law of 1879, Congress was not embarking on any new departure of according low mailing rates to periodical publications. Such substantially lower rates had been in effect continuously since the passage of the first general Postal Law in 1792.[8] It cannot be rightly argued, therefore, that Congress, without word or discussion, attached a drastic condition to the low mailing rates always accorded to periodicals when it enacted the Fourth Condition as part of the Postal Law of 1879.

The construction of the Fourth Condition presently urged by the Postmaster General involves the fundamental error of using the classification procedure as a means of passing upon the content of a publication in relation to merit or lack of merit. In enacting the classification provisions, Congress was concerned not with the content and merit of written or printed material, but only with a physical allocation of mailable matter to certain classes whereby varying rates of postage could be charged. To the extent that Congress was concerned over content other statutes, criminal in nature, were specifically enacted so as to provide that, for example, obscene material (35 Stat. 1129, 18 U.S.C. 334), fraudulent material (35 Stat. 1130, 18 U.S.C. 338), and seditious literature (40 Stat. 230, 18 U.S.C. 344), were non-mailable in any class.[9] The Postmaster General

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[8] Newspapers were accorded a more favorable rate in 1792 (1 Stat. 232), and magazines in 1794 (1 Stat. 354).

[9] Clear indication that Congress never conceived that it had given the Postmaster General the power he has asserted here appears in the debates in Congress in 1908 when it was proposed to amend the obscenity statute so as to outlaw "disgusting", "vile" and "indecent" publications. Objections were made, in

automatically recognized the validity of the foregoing when he stated in his brief in the Court below that "A thought expressed in the form of a letter must pay 48¢ a pound for the use of the mails, the expression of the same thought in a book may be transmitted at 4¢ a pound; while in a magazine it may cost as little as 1½¢ a pound". By this statement the Postmaster General conceded that the classification of mail and the applicability of different rates of postage depend not on the content of the thought nor an evaluation of its merit but solely on the format by which it is conveyed.

We do not contend that Congress was not motivated by considerations of the public good when it passed laws designed to give more favorable rates to periodical publications. It may be assumed that this was the fact. Congress did not, however, delegate to the individual who might enjoy the incumbency of the office of Postmaster General at any particular time, the right to pick and choose according to his personal taste and moral standards which periodicals were for the public good and which, although admittedly "periodicals", were not up to his standards and therefore should be mailed in some class other than second. The point is well stated in the opinion of the Court below:

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substance, that such an amendment "would give to Postmasters General and Judges too great a power in using their individual sense and judgment of what would be indecent to exclude from the mail what has heretofore been mailable matter". (Congressional Record, Vol. XLII, pp. 905-908, Jan. 2, 1908; Vol. XLIII, pp. 283-5, December 15, 1908). Such objections are clearly inconsistent with the idea that Congress had already given the Postmaster General the power to pass upon risque and indelicate material when it passed the Fourth Condition in 1879. The proposed amendment to the obscenity statute did not pass.

> "Congress established the second-class mailing privileges because it believed that periodicals which disseminated public information, literature, art or science deserved to be encouraged on account of their contribution as a class to the public good. But the American way of obtaining that kind of contribution is by giving competitive opportunity to men of different tastes and different ideas, not by compelling conformity to the taste or ideas of any government official." (R. 1988-9)

One fact is clear and that is that Congress in enacting the Fourth Condition did not, assuming that it could have done so constitutionally, attempt to draw a line between good and bad literature, refined or unrefined public information or classical and non-classical art.

Congress, in passing the act of 1879, was fully aware that many periodicals which were of doubtful benefit to the public in the educational and virtuous sense would benefit by the low second-class rates. Thus at the time of the passage of the act and in connection with a dispute over a slightly higher rate (within the second class) which was to be charged to periodicals published less frequently than once a week, Representative Money, a member of the Postal Committee, referred to "the mass of ephemeral dailies that furnish the gossip and scandal of the hour,"[10] and to "the daily newspapers, with their load of gossip and scandal and everyday topics that are floating through the press",[11] as being entitled without question to the lowest second-class rate and complained that higher rates were charged to better grade publications.

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[10]Congressional Record Vol. VIII, p. 693, January 23, 1879.

[11]Congressional Record Vol. VIII, p. 2135, February 28, 1879.

There is, then, no support whatever for any argument that the circumstances surrounding the passage of the Fourth Condition as part of the act of 1879 establish that Congress intended to empower the Postmaster General to withhold second-class rates unless the publication meets his test of affirmative contribution to the public welfare. On the contrary, the facts negative that proposition.

(c) The Postmaster General's Interpretation of the Fourth Condition in the Instant Case is Contrary to 65 Years of Settled and Uniform Administrative Practice.

The history of the Fourth Condition since 1879 and its practical construction by all Postmasters General, including the incumbent who made the revocation order in the case at bar, show conclusively that Congress did not delegate any discretionary power of censorship when it used the words of the Fourth Condition to identify the periodicals entitled to second-class rates. The statute has always been understood to include all periodicals in the usually accepted sense, and to exclude none. It has never been interpreted to authorize the Postmaster General to pass upon the content of periodicals and to decide whether they conform to his view of the public good.

In 1904 the then Postmaster General argued before this Court that the language of the Fourth Condition is comprehensive and includes all periodicals which are, in the commonly accepted sense, known and recognized as such. In his brief in the case of *Houghton* v. *Payne*, 194 U. S. 88 (1904), the Postmaster General said:

> "Taking these words 'originated and published for,' 'dissemination,' 'information,' 'devoted to,' they all point to one conclusion. They are, we repeat,

strong and pregnant words. There is but one concept consistent with them all. We confidently submit that an attentive reading of the statute will leave no doubt that what Congress constantly had in mind in the creating of this privileged class of publications was the universally recognized, commonly accepted, and perfectly well understood periodical of everyday speech.' (p. 34).

* * *

"In establishing a rate for 'newspapers and other periodical publications' Congress was not seeking to discriminate between good literature and bad literature or to establish a censorship of the press with prizes for merit. The thing it had in mind was not the goodness or the badness of the information disseminated but the instrumentalities by which that dissemination might be accomplished." (p. 73).

In 1906 a joint commission of Congress was authorized to make an inquiry regarding the whole subject of second-class mail matter. That commission held many hearings, heard numerous witnesses and made an exhaustive study of the statute. It concluded that the words of the fourth condition were *"so broad as to include everything and exclude nothing."* With reference to the precise question presented here, it concluded as follows:[12]

"* * * But in what way can it be said that a requirement that a certain printed matter should be 'devoted to literature' serves to mark it off from anything else that can be put into print. There is

[12] House Document No. 608, Postal Commission 1906-07, 59th Congress, 2nd Session. "Report Regarding Second Class Mail Matter."

practically no form of expression of the human mind that can not be brought within the scope of 'public information,' 'literature, the sciences, art, or some special industry.' It would have been just as effective and just as reasonable for the statute to have said, 'devoted to the interests of humanity,' or 'devoted to the development of civilization,' or 'devoted to human intellectual activity.'

"The prime defect in the statute is, then, that it defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing.

"With the exception of a few instances where the publication has been excluded because the information was deemed not to be public, no periodical has ever been classified by the application of tests of this kind. Any attempt to apply them generally would simply end in a press censorship." (pp. xxxvi-xxxvii.)

This Postal Commission recommended an amendment to the statute to limit second-class rates by changing the law to read:

"Fifth. It must be originated and published (a) for the dissemination of current public information, or (b) for the presentation, discussion, or treatment of current topics in relation to literature, the sciences, arts, or some special industry.

"Sixth. It must not consist wholly or substantially of fiction."

Despite this elaborate report specifically calling the attention of Congress to the breadth of the second-class statute, the Commission's recommended amendments were rejected and no amendment has ever been made to the

Fourth Condition by way of any limitation on the type of public information, literature, arts or sciences that is required.

A few years later Congress by joint resolution approved March 4, 1911, authorized the appointment of another commission on second-class mail matter. The commission was headed by Hon. Charles E. Hughes, then Associate Justice of this Court, and included the late President A. Lawrence Lowell of Harvard University. It made a most exhaustive and critical inquiry into the subject of second-class matter. This commission reached virtually the same conclusion:

> "* * * but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational value. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute—'devoted to literature, the sciences, arts, or some special industry'—must have a broad interpretation."[13]

Although amendments have been made to the second-class mailing statute and others proposed, and although Postmasters General have repeatedly pointed out alleged defects in the broad provisions admitting periodicals to second-class rates,[14] it is significant that no change has been

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[13] House Document No. 559, Postal Commission 1911-12, 62nd Congress, 2nd Session, "Report of Commission on Second-Class Matter", p. 142.

[14] House Document No. 608, Postal Commission, 1906-07, 59th Congress, 2nd Session, Report Regarding Second Class Mail Matter, page 6.

made in the Fourth Condition by Congress and that every bill seeking such a change has been defeated.[15]

Finally, the Postmaster General who undertook to revoke the second-class permit of Esquire made three rulings within the preceding six months in which he rejected a suggestion that the words of the Fourth Condition be used to justify a determination that the content of a periodical was not for the best interests of the public. For example, on July 6, 1943, the Postmaster General held a hearing on an application of "The National Police Gazette" to be admitted to the mail at second-class rates. Two members of the Hearing Board recommended that the application be denied upon the ground, *inter alia*, that it was not published for the dissemination of information of a public character because it did not "contribute to the education, prosperity and best interests of the people" (Pl.'s Ex. 9 in Dist. Ct., R. 1927). The third member of the Hearing Board dissented from this view and wrote two memoranda recommending that the application be granted (Pl.'s Exs. 10 & 11 in Dist. Ct., R. 1928). In these he pointed out that the duty of the Postmaster General in classifying mail was limited to a question of identification, and that he had no power to pass upon the

[15] "In 1915, a bill (H.R. 20644, 63d Cong., 3d sess.) was introduced in Congress to deny the use of the mails entirely to any person who, in the opinion of the Postmaster, 'is engaged or represents himself as engaged in the business of publishing any books or pamphlets of an indecent, immoral, scurrilous or libelous character.' It was objected that '* * * it is not safe to leave to the decision of one man, after an ex parte investigation, a decision which will involve the freedom of the press.' The bill did not pass. [Hearings Before the Committee on Post Offices and Post Roads on Exclusion of Certain Publications from the Mails, 63rd Cong., 3d sess. (1915), pp. 38, 39.]" [Eberhard P. Deutsch, Freedom of the Press and of the Mails, 36 Mich. L. Rev. pages 723-4.]

content of the publication and determine whether it was good or bad literature. He said (p. 3 of Ex. 11 in Dist. Ct., R. 1928):

> "I challenge any one to cite or quote any applicable authority supporting the construction put upon the words of the statute quoted by the majority members of this board. Even the Commission headed by Chief Justice Hughes said in their report: '* * * the experience of the Post Office has shown the impossibility of making a satisfactory test *based upon literary or educational values. To attempt to do so would be to set up a censorship of the press*'.
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> * * * * *
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> "Under the authorities here cited the National Police Gazette is devoted to literature and the arts within the meaning of the statute as above construed by the Postal Commission of 1907. If the theory of the majority members is accepted, the thin edge of the wedge of censorship has got into a crack and it won't be long till freedom of the press will be split up to suit the censors."

In reviewing the case and commenting upon the division of opinion within the Hearing Board, Third Assistant Postmaster General Ramsey S. Black said (Pl.'s Ex. 12 in Dist. Ct., R. 1931):

> "As to the second reason for denial of the application given in the majority report of the Hearing Board, namely, 'The National Police Gazette' 'is not published for the dissemination of information of a public character' because it is not the kind of publication which Congress had in mind when establishing the second-class mailing privilege, it is my opinion that this reason is unsound, constitutes cen-

sorship of the press, and could not be sustained in the court. * * *"

The Postmaster General granted the second-class mailing rate.

Similar cases were presented in respect of "The Hobo News" and "Laff", and similar results were reached (Pl's Exs. 15, 16, 21 and 22 in Dist. Ct., R. 1933-9, 1943).

Thus the construction of the Fourth Condition, adopted in actual practice by the Post Office Department and all Postmasters General including the one who made the revocation order in the present case, has always been to admit to second-class entry every publication which was a periodical in the generally accepted sense and to deny that Congress delegated to the Postmaster the power to pass upon the content of the publication.

The Postmaster General seeks to avoid the effect of 65 years of administrative construction of the Fourth Condition by referring to *Houghton* v. *Payne*, 194 U. S. 88 (1904) where this Court affirmed a ruling of the Postmaster General that the Riverside Literature Series (consisting of books bound in paper covers and published monthly or quarterly) were not periodicals notwithstanding that for many years it had been the practice to give second-class rates to such publications. It was pointed out there, however, that evidence of contemporaneous construction is given great weight only when the statute is ambiguous and, in that case, the statute was clear and precise. In the case at bar our primary contention is that the statute is clear and that the Postmaster General's interpretation is wrong. The most that can be said for the Postmaster General's contention is that the statute is ambiguous and, consequently,

the administrative construction of almost 65 years would resolve the ambiguity against him. *United States* v. *Finnell*, 185 U. S. 236 (1902), *United States* v. *Chicago North Shore & Milwaukee Railroad Co.*, 288 U. S. 1 (1933), *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615 (1892).

(d) There is no Warrant in any Judicial Opinion for the Postmaster General's Interpretation of the Fourth Condition.

The only case in which a Postmaster General has utilized the words of the Fourth Condition in an attempt to extend his power over second-class mailing rights is *Payne* v. *National Railway Publishing Co.*, 20 App. D. C. 581 (1902).[16] In that case the Postmaster General undertook to correct what he believed to be abuses of second-class mail by passing a regulation requiring that a publication, to be entitled to second-class rates, must "consist of current news or miscellaneous literary matter, or both (not including advertising)". The publication there involved was "The Railway Guide", which was issued monthly and contained railroad and steamboat time-tables with general information concerning the movements of the trains and boats. It had been mailed in the second class for many years. The Court held that the Postmaster General's order revoking the second-class rates under his "current news" regulations was invalid and stated (pp. 597-9):

> "It is very clear that the Congress of the United States has not committed to the Postmaster General, or to any one else, the matter of determining what should be carried in the mails as second-class matter,

[16] Certiorari granted 189 U. S. 512; certiorari dismissed on motion of Postmaster General, 192 U. S. 602.

and what as matter of the third class. It has reserved that power exclusively to itself. It has itself made the classification; and it is not competent for the Postmaster General to add anything to the statute or to take anything from it.

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"Of course the Postmaster General and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by Congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute.

"The postal regulation of July 17, 1901, under which it was sought to exclude the relator's publication from the category of second-class mail matter, is clearly in excess of the statute. It prescribes conditions which the statute does not prescribe."

Other authorities have uniformly held that an administrative official may not add new conditions to the requirements of statutes, even when the additional requirements are imposed under the pretext of concern for the public welfare. *Morrill* v. *Jones*, 106 U. S. 466 (1882) is a case in point. There a section of the revenue law provided that animals which were specifically imported for breeding purposes should be admitted free of duty. The Secretary of the Treasury, apparently not satisfied with this limitation and, like the Postmaster General in the case at bar, purporting to be more sensitive than Congress in his concern for the public welfare, adopted an additional regulation to the effect that such breeding animals should not be ad-

mitted free of duty unless they were also of superior stock. It is obvious that the Secretary's regulation specifying the additional requirement of "superior" quality corresponds to the Postmaster General's new condition of "contributing to the public good". This Court unanimously held that the new condition was invalid, stating (p. 467):

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. * * * In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. * * *"

The similarity in the case at bar of the administrative official attempting to regulate beyond the powers given to him by Congress is apparent.

The argument of the Postmaster General (Pet. Br. pp. 13-16) that the decisions of *Houghton* v. *Payne*, 194 U. S. 88, *supra*, *Bates & Guild Co.* v. *Payne*, 194 U. S. 106 (1904), and *Smith* v. *Hitchcock*, 226 U. S. 53 (1912), give him some discretion in limiting the scope of the language of the Fourth Condition is completely without justification. Those cases had nothing to do with the Fourth Condition. They merely held that complete books or musical scores, enclosed in paper covers and published at regular intervals, were not periodicals. There was no suggestion in any of those cases that the Postmaster General has any discretion to pass upon or evaluate the content of periodical publications.

Lewis Publishing Co. v. *Morgan*, 229 U. S. 288 (1913), also relied upon by the Postmaster General, actually supports the position of Esquire. In that case this Court upheld a statutory regulation compelling publishers to file certain information about the ownership of their publications. But while the regulation in question was held reasonable and proper, this Court pointed out that the case did not present any "regulation of what should be published" (p. 316 of 229 U. S.). In the case at bar we are faced with that precise situation, which the Court clearly implied would not be countenanced.

POINT II

IF THE POSTMASTER GENERAL'S INTERPRETATION OF THE FOURTH CONDITION WERE ADOPTED, THE STATUTE WOULD BE AN UNCONSTITUTIONAL ABRIDGEMENT OF FREEDOM OF THE PRESS IN VIOLATION OF THE FIRST AMENDMENT.

In answer to the Postmaster General's contention that the Fourth Condition requires him to determine in the case of each publication for which admission is sought to second class mail whether it discharges "a positive duty to contribute to the public good and the public welfare," the Court below held:

> "It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional." (R. 1988)

According to the Court, "the broad principles outlined in the following cases make this conclusion inescapable: *West Virginia State Board of Education* v. *Barnette*, 319

U. S. 624 (1943); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Near* v. *Minnesota*, 283 U. S. 697 (1930); *Pike* v. *Walker*, 73 App. D. C. 289, 121 F. (2d) 37 (1941). See also dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *United States ex rel. Milwaukee S. D. Pub. Co.* v. *Burleson*, 255 U. S. 407 (1920)." (R. 1988, fn. 2).

In what follows, we shall develop in greater detail the reasons why the foregoing and related decisions of this Court make the conclusion of unconstitutionality inescapable.

(a) The Postal Power is Limited by the First Amendment.

The Postmaster General argues that "the power of censorship" is not involved here; that Congress in promulgating the Fourth Condition (assuming, arguendo, that it means what the Postmaster General says it means) was merely exercising "the power to provide for the Postal Service." (Pet. Br., p. 22). This is double talk. The "power of censorship" is rarely sought to be exercised directly as such. Especially is this true of the federal government, which is a government of delegated powers. The point was expressed in the concurring opinion of Mr. Justice Jackson in *Thomas* v. *Collins*, 323 U. S. 516 (1945) (at p. 547):

> "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control."

The power of Congress to provide for the Postal Service is, like the interstate commerce and other delegated powers, subject to the inhibitions of the First Amendment:

> "It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution." (*Pike* v. *Walker*, 121 F. (2d) 37, 39 (1941)).

Just because the United States Government is a government of delegated powers, it would be an odd doctrine indeed that any degree of immunity from the Bill of Rights could attach to a governmental edict merely because it purported to be an exercise of a delegated power. Obviously, "Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional." (Mr. Justice Brandeis, dissenting in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 430 (1920)).

(b) The First Amendment is Primarily Directed Against Prior Restraints on Publication and Circulation.

There is no question but that the guarantee of freedom of the press includes freedom to circulate as well as freedom to publish. As this Court recently reiterated in *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938):

> ". . . Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value. Ex Parte Jackson, 96 U. S. 727, 733." (Matter in brackets ours).

There is also no question but that the First Amendment was primarily directed against the imposition of prior restraints on publication and distribution:

> "In the light of all that has now been said, it is evident * * * that by the First Amendment it was meant to preclude the national government and by the fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications or their circulation. * * *
>
> "This Court had occasion in *Near* v. *Minnesota*, *supra*, at pp. 713 *et seq.* to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the Constitutional provisions was to prevent previous restraints on publication, and the Court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the Constitutional provision, it was broadly said (p. 716), meant 'principally,' although not exclusively, immunity from previous restraints or [from] censorship." (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 249 (1936)).

In view of the foregoing, it is obvious that the Postmaster General is mistaken when he contends that "the line which marks off the area of constitutionality must be most strictly drawn when criminal sanctions are invoked against speech, publication or religious observance." (Pet. Br. p. 25).[17] The prohibition of the First Amendment is focused primarily on prior restraints.

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[17] An examination of the cases cited by the Postmaster General reveals that they do not support this contention. In *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) for example, the oppression of the statute could have been avoided by any parent who was economically able and willing to send his child to a private school or hire a private tutor, yet the Court held that an unconstitutional condition could not be imposed "on the privilege" of enjoying the economic advantages of free public education.

(c) The Fourth Condition, as Interpreted by the Postmaster General, Imposes a Prior Restraint.

The Postmaster General very explicitly points out that there are "no criminal sanctions involved here," that what is at stake is "simply the denial of second class privileges." (Pet. Br., p. 25), "a relatively mild consequence" (Id., at p. 26). We agree that exclusion from second class rates is not a "criminal sanction." Criminal sanctions are ordinarily if not invariably imposed subsequent to utterance, and they fall into the category not of prior restraint but of subsequent punishment. But the construction of the Fourth Condition for which the Postmaster General contends gives him the right in advance and as a condition of using the mails to compel Esquire to choose between two alternatives: compliance with his notion of what textual matter contributes to the public good and public welfare or the payment of an additional $500,000 for the transmission of its magazine through the mails. And it is to be noted that the stated financial burden affects not only the current issues, whose content is said not to contribute to the public good and welfare, but future issues not yet even composed as well.[18]

[18]The Court may well take notice of the similarity in effect of this penalty on future issues to a bill of attainder prohibited by Article I, Section 9, of the Constitution. It is a basic principle of democratic government that sanctions are to be applied only against a person or thing actually violating the law [See the Federalist (Lodge Edition 1882) page 279]. At the Constitutional Convention a motion was made to insert a declaration "that the liberty of the press should be inviolably observed" at the end of the clause regarding bills of attainder. This motion was vetoed because it was believed that as the Constitution was then written the power of Congress did not extend to the press. Thus the founders of the Constitution were fully aware of the grave dangers of 'censorship by employment of attainder,' the

A clearer instance of a prior restraint would be difficult to imagine. As a matter of fact, the Postmaster General in his brief in this Court freely concedes that his interpretation of the Fourth Condition means pre-censorship in its most virulent form; for he points out that under that interpretation "*the Post Office has insisted that Esquire submit its drawings in advance of publication in an attempt to avoid the necessity and difficulty of suppression after mailing.*" (Pet. Br. p. 45, italics ours). The concluding pages of the Postmaster General's brief make abundantly clear the inevitable results of the exercise of the power of censorship which he claims the Fourth Condition confers upon him. (Pet. Br. pp. 42-46).

As applied to any channel of communication, the prior restraint represented by the revocation order would be damaging. As applied to the mails, it threatens to be fatal to Esquire's very existence. For, in the words of the Court below, the mails today are the "highway over which all business must travel." "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare." (*Pike* v. *Walker*, 121 F. (2d) 37, 39, *supra*).

In the case of a periodical publication such as Esquire, access to the mails means access on the same terms as its competitors; realistically speaking, it means access to the

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very result threatened by the Postmaster General's order in this case. Farrand, The Records of the Federal Convention (Yale University Press 1937) Vol. 2, pages 617 and 618.

second class rates[19]. The Postmaster General concedes that "total suppression" of the circulation of writings and publications would be a "fatal blow * * * to the freedom of the press." (Pet. Br. p. 22). Yet that is precisely what is effected here. "To refuse the second-class rate to a newspaper is to make its circulation impossible." (Mr. Justice Holmes dissenting in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 437, *supra*). The precise argument advanced by the Postmaster General here was rejected by Mr. Justice Brandeis in his dissenting opinion in the *Burleson* case, *supra*, and as to this phase of the matter, the majority did not disagree (255 U. S. 407) (at p. 431):

> "It is argued that although a newspaper is barred from second class mail, liberty of circulation

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[19] In the Court below, the Postmaster General disclaimed any argument that use of the mails was a privilege rather than a right. In his brief in this Court, however, he constantly refers to "second class privileges" although he does not argue the point. Even if, however, the second class rates be regarded as a privilege, the unconstitutionality of the conditions upon which the Postmaster General seeks to withhold them remains. See *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, *supra*. In the words of the Court below:

> "Even if second-class mail service actually were a privilege which could be withheld in the Postmaster General's discretion we still do not think it could be used to purchase compliance with his literary standards. If a publication is not actually obscene the publisher's right of free speech is clearly involved. In our opinion the principle of *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922) and *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U. S. 1 (1910), which involves state imposition of unconstitutional demands on foreign corporations is broad enough to cover this situation. For a comprehensive review of cases supporting this principle see article by Robert L. Hale, 35 Columbia L. Rev. 321 (1935), entitled *Unconstitutional Conditions and Constitutional Rights*." (R. 1900, *in.* 5).

> is not denied, because the first and third class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and insubstantial. 'The constitution deals with substance not shadows. Its inhibition was levelled at the thing, not the name.' *Cummings* v. *Missouri*, 4 Wall. 277, 325."

The revocation order herein effects a "total suppression" of Esquire's circulation and is "a fatal blow * * * to the freedom of the press." (Pet. Br. p. 22).

But we do not have to establish that the revocation order would effectively terminate the existence of Esquire or completely bar it from the mails. Even if the restraint here were less severe, were, to use the Postmaster General's words "relatively mild," (Pet. Br., p. 26), it would still be unconstitutional.

> "The restraint is not small when it is considered what was restrained. The right is a national right federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plainly illustrated than they are imposed on the most basic rights of all. Seedlings planted in that soil to grow great and growing, break down the foundations of liberty." (*Thomas* v. *Collins*, 323 U. S. 516, 543, *supra*).

This Court has repeatedly applied the protection of the Constitutional guarantee to prior restraints on freedom of

expression of every kind and degree. The protection has not been limited to cases where as here the restraint threatens the very existence of the publisher.[20] In fact, the Court has been "careful not to limit the protection of the right to any particular way of abridging it." (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 249, *supra*).

Thus in *Lovell* v. *Griffin*, 303 U. S. 444, *supra*, the Court held unconstitutional an ordinance merely requiring a permit for the distribution of literature in public places, on the ground that it was a previous restraint. A like result was reached in *Hague* v. *C. I. O.* 307 U. S. 496, (1939), which involved a municipal ordinance requiring speakers to obtain permits as a condition of speaking in the public places of the municipality. In *Thomas* v. *Collins*, 323 U. S. 516 *supra*, the Court found that "a registration statute and nothing more" applicable to labor organizers was "incompatible with the freedom secured by the First Amendment", saying (p. 540):

> "So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious, or politi-

[20] It may be noted that in the cases hereinafter discussed in which the Court has declared unconstitutional statutes or ordinances restricting or prohibiting the distribution of pamphlets, house-to-house canvassing or the holding of meetings without registration or a license, there have been alternate ways in which the publication or speech might have reached the public yet the Court has held that notwithstanding the existence of other conduits the First Amendment prohibits interference with even one effective method of reaching the public mind.

> cal cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Near v. *Minnesota*, 283 U. S. 697 (1930) presents in substantial aspects a close parallel to the instant case. The *Near* case involved a Minnesota statute which provided for the issuance of an injunction against further publication of any paper found by the Court to be "a malicious, scandalous and defamatory newspaper." The statute set up standards far more precise than any the Postmaster General can point to in the Fourth Condition. Moreover, judicial—not administrative—findings were prerequisite to the issuance of an injunction. This Court nonetheless held the statute unconstitutional on its face, stating that while "charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal * * * the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication" (at p. 722).

The prior restraints in the cases just discussed took the form of licensing (*Lovell* and *Hague*), registration (*Thomas*) and injunction (*Near*) statutes. A financial burden imposed in advance of publication and circulation such as the revocation order here involved is equally invalid even when it does not impinge directly on content as it does herein.

As a matter of fact, one of the basic reasons for the adoption of the constitutional guarantee of freedom of the press was a desire to protect against the then current indirect restraints on free expression which took the form of

discriminatory taxes; so-called "taxes on knowledge." For over 100 years prior to the adoption of the First Amendment there had been no attempt by the government to restrain freedom of the press by direct prohibition, licensing or injunction. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245, *supra*. The British Government had repeatedly, however, restrained freedom of expression by imposing discriminatory taxes of many kinds upon the press—designed to encourage literature palatable to the rulers and to discourage that which might stir up dissatisfaction.[21] This type of financial restraint upon freedom of the press was unquestionably one of the abuses of governmental power that led to the passage of the First Amendment.

In *Grosjean* v. *American Press Co.*, 297 U. S. 233, *supra*, this Court had occasion to strike down as unconstitutional an indirect restraint on freedom of the press in the form of a financial burden considerably less severe than the $500,000 impost which in effect is sought to be imposed here.[22] That case involved a Louisiana statute imposing a tax of 2% on the gross receipts of all newspapers having a circulation of over 20,000 and carrying paid advertising. In holding that the Louisiana tax was an unconstitutional

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[21] For a discussion of such taxes and their administration, see 1 Collet, History of the Taxes on Knowledge, London, 1899, p. 29. In the American colonies the imposition of stamp taxes on newspapers caused a riot in New York in 1765. Deutsch, Freedom of the Press and of the Mail (1938), 36 Mich. Law Review 703, 710. Strong public reaction resulted from a few attempts of colonial legislatures to levy taxes on newspapers. Mott, American Journalism, 1941, page 144; Mott, The History of American Magazines, 1939, page 92.

[22] The financial burden against Esquire ($500,000 on circulation of 300,000 at $5 per subscription) would amount to 33⅓% as compared to the 2% tax imposed by Louisiana.

restraint on the freedom of the press, this Court reviewed the historical background of the First Amendment, pointing out that one of the basic reasons for the adoption of the guarantee of freedom of the press was a desire to prevent the imposition of financial burdens upon publications. It was held that the amendment protected not only against previous restraints in the form of more direct censorship but also against the imposition of special taxes or other financial burdens.

In the light of the foregoing, it is clear that if the Fourth Condition is construed as the Postmaster General contends, an unconstitutional prior restraint is established.

(d) The Only Exception To the Constitutional Inhibition Against Prior Restraints is "A Clear and Present Danger"; Failure of a Publication to Contribute to the Public Good and the Public Welfare Does not Fall Within the Exception.

This Court has described freedom of speech and of the press as "the matrix, the indispensable condition of nearly every other form of freedom." *Palko v. Conn.*, 302 U. S. 319, 327 (1929). The test of the constitutionality of a regulation which is alleged to conflict with these constitutional guarantees is not the ordinary due process test of reasonableness although that is obviously what the Postmaster General has in mind when he argues that "the test of validity of legislation necessarily varies with circumstances." (Pet. Br. p. 25.)[23] When it comes to free-

[23]The State of Texas, unsuccessfully, advanced the same argument with reference to the statute involved in *Thomas v. Collins*, 323 U. S. 516 *supra*: "In short, the state would apply a 'rational basis' test, appellant one requiring a showing of 'clear and present danger'." (at p. 527-8).

dom of the press, this Court has held that "the rational connection between the remedy provided and the evil to be curbed which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." (*Thomas* v. *Collins*, 323 U. S. 516, 530, *supra*). The presumption of constitutionality, normally operative in due process cases, loses its force where free speech and press are involved:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Prince* v. *Massachusetts*, 321 U. S. 158. That priority gives those liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.* 304 U. S. 144, 152-153." (*Thomas* v. *Collins*, 323 U. S. 515, 529-30; *supra*).[24]

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[24] In the *Carolene Products* case, 304 U. S. 144 (1938) cited by the court, Mr. Chief Justice Stone forecast this later ruling when he remarked (p. 152 fn. 4):

> "There may be narrower scope for the operation of the presumption of Constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the 14th. See *Stromberg* v. *California*, 283 U. S. 359, 369, 370 . . . ; *Lovell* v. *Griffin* . . . , 303 U. S. 444, 452 . . ."

Previously this Court had, in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, *supra*, emphasized the inapplicability of the due process test to First Amendment cases, saying (p. 639):

> The right of a state to regulate for example a public utility may well include as far as the due process test is concerned power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender ground. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

Although many of the prior restraint cases in this Court appear to assume that there is no exception to the prohibition against such restraints, for the purposes of this case it may be assumed that an exception exists in the form of the "clear and present danger" rule. This rule has been strictly interpreted and it is obvious that the issues of Esquire here in question do not fall within it.[25] This Court has never found that such a "clear and present danger" exists where as here

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[25] Cases involving regulation of commercial enterprises such as *Valentine* v. *Christensen*, 316 U. S. 52 (1942), *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469 (1941), and *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230 (1914) are not, strictly speaking, exceptions to the broad guarantees of the First Amendment. They involve applications of the police power to business matters where the effect on speech and press is incidental and indirect. Even in such cases, the constitutional guarantees are upheld whenever the regulation has the primary effect of curtailing freedom of expression. Cf. *Thomas* v. *Collins*, 323 U. S. 516, *supra*.

> "The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare." (*Thomas* v. *Collins*, 323 U. S. 516, 536, *supra*).

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high * * *" *Bridges* v. *California*, 314 U. S. 252, 263 (1941). "Neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." (Id. at 273).

At one point, the Postmaster General recognizes the applicability of the "clear and present danger" rule to the instant case for he argues that "As respects 'clear and present danger', the immediacy of the financial loss incident to public subsidization of a periodical that Congress deems ineligible for second-class privileges is not open to doubt." (Pet. Br., pp. 25-26). It is obvious from the quotations from the cases above and from the whole line of "clear and present danger" decisions that the factor adverted to by the Postmaster General falls far short of the constitutional requirements. The Postmaster General's argument is patently unsound since obviously the "clear and present danger" must be something far more serious and threatening than the possibility of financial loss. If the argument were accepted a publication criticizing a revenue law or any program for governmental assessment would be within the "clear and present danger" rule. The allegedly threatened "financial loss" to the government is infinitely less of a "clear and present danger" than the assaults and the commission of crime which the State of Minnesota found on

the basis of actual past experience were threatened by the publication sought to be suppressed in the *Near* case. Yet in the *Near* case, this Court acknowledging that the paper "tends to disturb the peace of its community" and "to provoke assaults and the commission of crimes" held that Minnesota was without power to interfere with the publication. "The theory of the constitutional guarantee is that even a more serious evil would be caused by authority to prevent publication." (*Near* v. *Minnesota*, 283 U. S. 697, 722, *supra*).

Except for the one sentence adverted to-above, the Postmaster makes no effort to justify his revocation order on the ground of clear and present danger. In effect, as we have seen, he defends on the ground of Esquire's failure to contribute to the public good and welfare. Assuming arguendo, that such a failure on the part of Esquire is established, it plainly does not constitute a "clear and present danger" within the meaning of the rule.

Concern for the public good has been historically the proffered excuse for curtailment of free expression. And even when the concern has been justified (which we deny to be the case here) the excuse has been rejected. Thus Thomas Jefferson wrote:

> "I deplore * * * the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them * * *. These ordures are rapidly depraving the public taste.
>
> "It is, however, an evil for which there is no remedy; our liberty depends on the freedom of the press, and that cannot be limited without being lost." (Quoted in *Bridges* v. *California*, 314 U. S. 252, 270, *supra*.)

The same philosophy is expressed by Mr. Justice Holmes, dissenting in *Abrams* v. *United States*, 250 U. S. 616 (1919) (at p. 630):

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

Whatever the merits of Esquire as a publication, the Postmaster cannot under a plea of public interest impose such a prior restraint against its dissemination as it is sought to justify here:

> "But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. *The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.* In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. Nor would I. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom.

"This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy." (*Thomas* v. *Collins*, 323 U. S. 516, 545, *supra*, concurring opinion of Mr. Justice Jackson.) (Italics ours).

(e) There is no Support in the Decisions of this Court for the First Amendment Arguments Advanced by the Postmaster General Herein.

The Postmaster General adverts to only two decisions of this Court as direct authority for the stand he has taken on freedom of the press. *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, *supra*, and *Lewis Publishing Company* v. *Morgan*, 229 U. S. 288, *supra*. Neither of these cases supports his contention that the Fourth Condition as he seeks to construe it is valid under the First Amendment.

The Postmaster General himself acknowledges the inapplicability of much of the language in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, *supra*. He recognizes that "the revocation of second class privileges which was there upheld over the dissents of Mr. Justice Holmes and Mr. Justice Brandeis was produced by the inclusion of non-mailable matter in a limited number of past issues of the newspaper involved." (Pet. Br. p. 29). The majority of the Court in the *Burleson* case placed their decision on the narrow ground that since Congress had declared the seditious material there submitted for mailing to be nonmailable in any class, the Postmaster General was justified

in preventing such material from being mailed in the second class. We submit that the later decisions of this Court discussed above cast considerable doubt even on this narrow holding. (See *Pike* v. *Walker*, 121 F. 2d 37, 39, *supra*). In any event, the decision in the *Burleson* case has no relevance here because it is conceded that Esquire is mailable. (R. 1892).

Lewis Publishing Co. v. *Morgan*, 229 U. S. 228, *supra*, buttresses Esquire's position rather than the Postmaster General's. In that case, this Court upheld a statute which required publishers to file certain information as to the ownership of their publications. The Court expressly stated that it was "concerned not with any general regulation of what should be published" but merely with a reasonable regulation incidental to the classification procedure. (p. 3[illegible] of 229 U. S.) The Court thus clearly pointed out that an evaluation of the content of a publication would not be justified under any guise or pretext that it was a classification regulation—that is the justification advanced here for the revocation order which is admittedly based on the nature of Esquire's content.

(f) The Unconstitutionality of the Postmaster General's Construction of the Fourth Condition is Further Reason for the Adoption of the Construction of the Statute Urged in Point I supra.

We submit that we have established in this Point II the correctness of the Court of Appeals' conclusion that if the Postmaster General's construction of the Fourth Condition were adopted, the statute would be an abridgement of the freedom of press guaranteed by the First Amendment. At the very least it can be said that the constitutionality of the

statute as construed by the Postmaster General is open to grave doubt. This doubt presents an additional and compelling reason for adopting the construction of the statute urged in Point I herein.

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*U. S.* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)).

See to the same effect *U. S.* v. *Jim Fuey Moy*, 241 U. S. 394, 401 (1916): "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score."

POINT III

THE FOURTH CONDITION, AS INTERPRETED BY THE POSTMASTER GENERAL, WOULD BE UNCONSTITUTIONAL AS AN IMPROPER DELEGATION OF LEGISLATIVE POWER.

The Postmaster General's interpretation of the Fourth Condition raises a further constitutional question. It involves the delegation to him of the power to withhold second-class rates on condition that the publication fulfill a "positive duty to contribute to the public good" (R. 1863). The limit of his assumed power is thus measured by the vague and illusory concept "contribution to the public good" as applied to public information, literature and art.

The revocation order itself is indicative of the admitted lack of any standards or boundaries within which the Post-

master General may act for it asserts that some of the items complained of may fall in an "obscure and treacherous borderland zone" (R. 1863) so that whatever they "may be, they surely are not 'information of a public character' or 'literature, the sciences, arts or some special industry'" (R. 1864). It is obvious that the standard to be followed in the exercise of the power asserted by the Postmaster General is his personal fancy and that a publisher's enjoyment of second-class rates will depend on whether he has been fortunate enough to express his views in accordance with those of the Postmaster General.

Although the decisions of this Court have approved broad delegations of power by Congress to administrative agencies, in every case a fundamental requirement has been that Congress fix intelligent principles and standards to which the administrative agency is directed to conform. Wherever Congress has attempted to delegate power without standards or other criteria to delimit the power granted, this Court has held that such legislative action is unconstitutional. Thus in *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), a section of the National Industrial Recovery Act, purporting to authorize the President to prohibit transportation of petroleum products in excess of the amount allowed by any state law was held invalid for lack of definiteness in standards, this Court stating (p. 430):

> "Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that §9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement,

> no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

See also *Schechter Corp. v. United States*, 295 U. S. 495 (1935); cf. *Yakus v. United States*, 321 U. S. 414 (1944).

The Postmaster General argues that a standard of "contribution to the public welfare" is as definitive as many that have been approved. Cf. *Radio Commission v. Nelson Brothers Co.*, 289 U. S. 266 (1933); *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U. S. 230, *supra*. However, in the field of public information, literature and art, such a standard would, as the Court below pointed out, produce complete "mental confusion" (R. 1990). The Court below elaborated:

> "Opinions on such matters differ so widely that if the evidence in the record before the Post Office were to be weighed each side would have to continue calling witnesses indefinitely in order not to be outweighed by the other. We have no doubt that thousands of reputable experts on the public good could have been obtained by each side in this case. We know of no way a court can evaluate the comparative expert qualifications of persons who hold opinions on what the public should read. Once we admit the power claimed here we see no room for effective judicial review of its exercise. And so in practical effect it amounts to a power in the Postmaster General to impose the standards of any reputable minority group on the whole nation." (R. 1993-4).

It is submitted, therefore, that the Postmaster General's interpretation of the Fourth Condition would result in unconstitutionality on the further ground of an improper dele-

gation of power because of a lack of a definite and intelligible standard according to which the power is to be exercised.[26]

POINT IV

THE POSTMASTER GENERAL'S REVOCATION ORDER IS ARBITRARY, CAPRICIOUS, RESULTS IN UNJUST DISCRIMINATION AND, EVEN ON HIS OWN THEORY, IS UNSUPPORTED BY EVIDENCE.

Entirely apart from the considerations set forth in the preceding points of this Brief, we contend that the record establishes that the Postmaster General's revocation order is arbitrary, capricious, results in unjust discrimination and, even on his own theory, is unsupported by evidence.

(a) The Revocation Order is Arbitrary, Capricious and Results in Unjust Discrimination.

We submit that a fair reading of the record herein makes it evident that even prior to instituting proceedings the Postmaster General made up his mind to revoke Esquire's second-class mailing permit, accorded a hearing

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[26] The impossibility of setting up satisfactory standards designed to regulate speech and press was recognized by this Court in *Thomas* v. *Collins*, 323 U. S. 516, *supra*, where it was stated (p. 535):

> "In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers, and consequently of whatever inference may be drawn as to his intent and meaning.
>
> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. * * *"

ostensibly to comply with the requirements of due process, and finally entered his order, not on the merits of the case, but on a novel ground calculated to extend his own power over the periodical publications of the nation.

Illustrative of the extremes to which the Postmaster General is willing to go in his zealous but misguided program of censorship[27] are the following:

(1) notwithstanding repeated assertions in his revocation order that he was determining the case so as to permit a full review by the courts, the Postmaster General has pleaded in his answer and argued in all courts that his determination is final and not subject to review;

(2) the Postmaster General repudiated the Findings and Recommendations of his own, self-appointed Hearing Board;

(3) in his revocation order, the Postmaster General professes to be confused because of an alleged lack of uniformity and consistency in the application of the Fourth Condition although he himself had on three oc-

[27] There is a striking parallel between the Postmaster General's revocation order and Mr. Justice Jackson's reference in his opening statement in the Nuremberg trial to one of the aspects of the German totalitarian program. Referring to the Nazi Party, he said:

"Its hostility to civil liberties and freedom of the press was distinctly announced in these words: 'It must be forbidden to publish newspapers which do not contribute to the national welfare. We demand the legal prosecution of all tendencies in art or literature of a kind likely to disintegrate our life as a nation and the suppression of institutions which might militate against the above requirements.'" (New York Times, November 22, 1945).

casions shortly before repudiated the idea that he could withold a second-class entry upon the ground he now asserts, (See this Brief, pp. 28-30, *supra*), and although J. O. Bouton, an official in the Classification Division of the Post Office Department for over 20 years, affirmed that no qualitative test had ever been applied, to his knowledge, in administering the Fourth Condition (R. 1910-12);

(4) the Postmaster General's present Brief relies upon alleged violations of the obscenity law in the past in clear violation of his formal stipulation during pre-trial proceedings that he "does not defend on the contention that plaintiff's magazine is obscene within the meaning of 18 U. S. C. 334". (R. 1892).

The foregoing items are some of the highlights but the arbitrary and capricious tenor of these proceedings has been evident throughout. In the beginning the Postmaster General's sole charge was that the magazine was non-mailable because it was allegedly obscene (R. 1-2, 6). On October 8, 1943, just prior to the commencement of the hearings, counsel for the Postmaster General wrote to counsel for Esquire:

> "As I explained to you when you called here, I shall not contend in the hearing aside from the non-mailable obscenity angle that the publication does not comply with the Fourth condition of the Second Class Act." (R. 603)

The hearings commenced on October 19, 1943. On October 25, 1943, at the beginning of the second week of the hearings, counsel for the Postmaster General withdrew

from his former position and stated that, in addition to the claim of obscenity, he would also contend that the magazine did not comply with the Fourth Condition (R. 601-6).

This change of position was unquestionably brought about by the fact that during the first week of the hearings testimony by Kenneth J. Tillotson, physician and psychiatrist of Boston, Massachusetts, and consultant to the Hygiene Department of Harvard University (R. 50-202), Herbert W. Smith, principal of the Francis W. Parker school of Chicago, Illinois (R. 203-395), Louis J. Croteau Executive Secretary of the New England Watch and Ward society, a social service agency formed to assist in the enforcement of law and characterized as the "watch dog of New England morals" (R. 395-563), and Clements C. Fry physician and psychiatrist of Yale University (R. 563-600), made it clear that the Postmaster General's charges of obscenity were without foundation.

The change of position was countenanced by the Hearing Board. Thereafter, although the alleged obscenity continued to be the primary subject of investigation, Esquire presented testimony which conclusively established that the content of the magazine came within the categories of the Fourth Condition. Such evidence was given by Dr. Fred S. Seibert, Director of the University of Illinois School of Journalism, with respect to information of a public character;[93] by the President of the Associated American

[93] He analyzed Esquire from the point of view of "information of a public character" and testified in part as follows:

"Q. Would you say that the magazine Esquire is made up largely, if not chiefly, of material of information of a public character? A. I would.

"Q. And advertising, of course? A. When I say information of a public character, I mean that there is in that

Artists, Reeves Lewenthal, as to art content;[29] by Henry L. Mencken, author of "The American Language"; Dr.

publication a sufficient amount of that type of material, including advertising, to make it a magazine primarily of that character (R. 1191).

* * * *

"Q. Now, does the fact that these particular eleven issues of Esquire to which Mr. Hassell has referred contain material like the Varga girls and the Sultan cartoons and other cartoons change your opinion in any way that the magazine as a whole and each issue thereof is primarily devoted to the dissemination of information of a public character? A. No sir; it does not (R. 1192).

* * * *

"Chairman Myers: What is your idea about being devoted—you use the term 'devoted'—to literature, the arts, sciences, and so forth?

"The Witness: My idea being that that is one of the major appeals of the magazine. It has in each issue a sufficient number of items of that character in that number of the magazine.

"Chairman Myers: If it is devoted to a subject, it necessarily may touch upon, but not necessarily be what that subject purports to be?

"The Witness: Not exclusively.

"Chairman Myers: That is, a periodical may be devoted to literature and not be literature in the best and highest sense?

"The Witness: That is true.

"Chairman Myers: Is the same thing true about art?

"The Witness: I should say so. If it is devoted to art, whether it became art or not, wouldn't make much difference if that was the primary purpose" (R. 1193-4).

After testifying in some detail with respect to each issue, he summarized the art content and quality of the magazine as follows:

"Q. Would you say in summary, then, that in each one of these eleven issues there has been a substantial art content of high value? A. I definitely would, sir" (R. 1137).

Ernest Osborne, of Teachers College, Columbia University; Raymond Gram Swing; Bennett Cerf; George Jean Nathan and many others as to the high literary quality of Esquire.[30]

Although one member of the Hearing Board differed from the majority in respect of one item of the cited material, there was no division on the point that the magazine complied with the Fourth Condition. The dissenting member of the Board felt that many of the cited items, while not obscene, were objectionable and therefore raised a question as to whether Congress intended to extend the benefits of second-class rates to such publications. His recommendation, however, was that the whole subject be submitted to Congress for new legislation (R. 1854-5).

The findings of the Hearing Board unquestionably embarrassed the Postmaster General in his effort to bar the magazine from the second-class rates. He therefore suggested that the Chairman make a supplementary review of the case and this was done under date of November 22,

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[30]Swing testified as follows with respect to the quality of the fiction content of the magazine:

"Q. Would you say it was usual for Esquire over years to have printed pieces of fiction which deserve to rank as literature? A. Oh, yes; I think Esquire has probably done much better than its share of publishing first rate artistic fiction.

"Q. Would you say that it had a reputation over its ten year period for having published a very considerable amount of first rate short story fiction? A. Oh, yes; I think it has some of the best writing that has been found anywhere in American periodical literature" (R. 881).

Mencken testified that "* * * Esquire has very high literary merit * * *" and that "Practically all the principal American authors have written for it in my time, headed by Dreiser, and including every author of any significance whatsoever" (R. 1151-2).

1943[31] (Pl.'s Ex. 25 for iden. in Dist. Ct.). This supplementary recommendation reaffirmed the Chairman's conclusion that the magazine was not obscene and suggested the possibility of new legislation pursuant to which the Postmaster General might act against matter which he regarded as objectionable.

The Postmaster General, however, held that the Fourth Condition had not been complied with, obviously not because of any objective determination that the content was not public information, or literature, or art, but upon the novel theory that the magazine did not measure up to the Postmaster General's ideas of the public welfare. It is fully apparent from the revocation order that the Postmaster General was cognizant of his unprecedented assumption of power for it states that he should not be reluctant "to determine the matter in such a way that all phases of it may be fully considered and decided by a court of competent jurisdiction" (R. 1862). Presumably more opportune judgment later prevailed with the result that ever since the Postmaster General has strenuously urged that his determination is final and not subject to court review.

The record further shows that the uniform practice of granting second-class entry to all periodicals without regard to the value of their content was not due to oversight or laxity as has been suggested at times by the Postmaster General in the Courts below. And it also shows that this case has not been decided on its own merits but as an incident in a broad program to extend the powers of the Postmaster General. Indeed, counsel for the Postmaster General expressly stated (R. 1906):

[31] Although the District Court excluded this document from evidence (erroneously, we believe), Esquire was permitted to refer to it in argument (R. 1949).

> "I will say of record that if this order stands other publications which are now getting the second-class privilege will no longer get it."

The foregoing, we believe, makes it sufficiently clear that the revocation order is arbitrary and capricious and based upon a disregard for the merits of the case. The case has been merely the vehicle by which the Postmaster General has attempted drastically to extend his administrative power.

In addition, the record discloses that the revocation order, if permitted to stand, would be clearly discriminatory against Esquire Magazine. An examination of the magazine and the testimony with respect to its content shows that it is not substantially different from other nationally known publications (testimony of Lloyd H. Hall generally, R. 1019-28, Respondent's Exhibit 46 before Post Office Department, R. 1024). The Hearing Board found, in effect, that the magazine was in accord with current standards and the "mores of the day" and that many other publications having similar content are accorded the second-class rates.

Finally the record establishes without contradiction that although over 25,000 publications now enjoy second-class rates and although a qualitative test has never been applied in the past 65 years of the administration of the Fourth Condition, Esquire Magazine has been singled out to be the subject of the Postmaster General's novel concept of postal classification.

The situation makes apt the words of the Court of Appeals for the District of Columbia in *Consumers Union of United States, Inc.* v. *Walker*, 145 F. 2d 33, 35 (1944):

> "In the Government's brief, it is urged by way of excuse for no action having been taken against

> Fortune Magazine, the Reader's Digest, or the American Medical Journal, that this was probably the result of oversight and that no benefit can be claimed in favor of the pamphlet issued by appellant merely because the Postmaster General has neglected to proceed in other cases. This is not a persuasive argument. * * * Whether intended or not, the result of the action taken in the present case constituted a clear discrimination against appellant's pamphlet in favor of the others."

It is manifest from the record that the Postmaster General failed to pass upon the merits of the instant case, based his revocation order on a theory contrary to all precedent, and adopted a strained and unjustified construction of the Fourth Condition in an effort to extend his power over periodicals using second-class mail. The only justifiable conclusion is that the revocation order is arbitrary and capricious and discriminatory against Esquire Magazine.

(b) Even Adopting the Postmaster General's Theory, the Revocation Order is not Supported by Evidence.

In discussing the matter of whether there is evidence to support the Postmaster General's determination, even upon his own theory of the case, an inherent difficulty is presented because of the lack of any intelligible or definable standard to be applied. Upon the Postmaster General's appraisal, a publication may sometimes fall into an "obscure and treacherous borderland zone" and thereby incur his condemnation; and the lack of a definitive standard produces a corresponding uncertainty as to whether evidence is present to support a finding. Several examples of the resulting uncertainty are given in the opinion of the Court

below for the purpose, however, of conclusively proving the fundamental fallacy of the Postmaster General's revocation order. And although the Court below agreed with the theory that an administrative determination, if supported by substantial evidence, is binding upon the courts, it nevertheless did not hold that there is substantial evidence to support the order in the case at bar.

The Postmaster General's theory seems to be that some of the material in Esquire is, in his opinion, risque and lacking in good taste, that these attributes supply the predominant characteristic of the magazine, and that the magazine with such a predominant characteristic does not disseminate public information nor is it devoted to literature or art.

It is apparent that in order to justify an order based on the foregoing theory there must be evidence on the subject of the predominant character of the magazine. As we see it there are only two possible methods by which such evidence could be supplied, viz., by establishing that the quantity of the objectionable material exceeds that which is unobjectionable, or by showing subjectively that the magazine as a whole derives its character from specified objectionable features. If the quantitative method is used it is at once obvious that there is insufficient evidence since at the most only about 2% of all the material contained in the 11 issues was seriously questioned. Presumably then the Postmaster General relies on the subjective method in his attempt to find evidence to support the order. But even on this basis there is no evidence to show that the magazine as a whole is predominantly given over to matter which, because of its allegedly questionable moral character, is not public information, literature or art.

The Postmaster General's brief relies, first of all, on the testimony of Mr. Gingrich, editor of Esquire, to supply such evidence. It is contended that the fact that 12 years ago, prior to its commencement as a magazine of general circulation, Esquire was a medium for advertising men's attire and, as such, was devoted primarily to masculine tastes and had a "stag party type of treatment" (R. 1160). We agree with the clear implication in the opinion of the Court below that such testimony hardly constitutes substantial evidence that a magazine is predominantly devoted to indelicate and unseemly ends (R. 1993).

The Postmaster General's brief next points to testimony of Mr. Gingrich that Esquire attracted imitators which, however, placed their emphasis on so-called "leg art, sex jokes, chorus girls, gold-diggers and that sort of thing" (R. 1284). Certainly evidence as to what imitators of one phase of a magazine were doing is not evidence of the predominant character of that magazine. Moreover, we regard the Postmaster General's reliance upon such evidence as indicative of his lack of fairness for he appears in this respect ready and willing to condemn Esquire not for what it did but because of what its imitators did.

The next type of evidence which the Postmaster General relies upon is equally insufficient and equally indicative of his lack of fairness. That evidence has to do with testimony about the sale of "Varga Girl," calendars, playing cards, and other merchandise which are sold as a separate part of the business of Esquire, Inc. and which are advertised from time to time in its magazine. Obviously such evidence has no relevancy whatsoever to the dominant characteristic of the magazine. Presumably the reference to it in the Postmaster General's brief is designed to give rise to the idea that the predominant purpose of Esquire

Magazine is to sell calendars, playing cards, cook books and jig saw puzzles rather than to publish a magazine of general appeal. We believe the mere statement of the idea is sufficient to demonstrate its lack of substance. And it may be noted that the Postmaster General overlooks the fact that it has never even been claimed in this case that Esquire is designed "primarily for advertising" (R. 26, 1976).

Likewise without merit is the argument in the Postmaster General's brief that the revocation order is supported by evidence because in past years Esquire allegedly has been guilty of publishing obscene matter. We have pointed out above that this argument involves a clear breach of the Postmaster General's solemn stipulation in pretrial proceedings that he would not defend his order on the ground of obscenity but its more indefensible aspect lies in the fact that it would lead the Court to believe (contrary to the fact) that on frequent occasions in the past Esquire has been tried and found guilty of obscenity. Actually, the instances alluded to are occasions when the Postmaster General has objected to items in the publication and *charged* that they were obscene. No hearing or determination on the propriety of such charges was ever had. Instead Esquire, in a spirit of cooperation, undertook on such occasions to attempt to make changes to suit the Postmaster General and for a substantial period submitted its magazine in advance for his consideration. In retrospect, the efforts of Esquire to cooperate with the Postmaster General were doubtless unwise. But the foregoing, plus the circumstances that many other magazines became subject to this type of pre-editing,[32] highlight the insidious character

[32]Counsel for the Postmaster General admitted: "And pretty soon we had over sixty questionable publications that we were supposed to examine and give a sort of pre-edit on." (R. 1772).

of the Postmaster General's program to attain a position where he can censor in advance all periodical publications. The circumstances show beyond question that to uphold the revocation order would result in a dictatorship of the Post Office Department over the public press.

Finally, the Postmaster General's brief refers, rather apologetically in one concluding paragraph, to the testimony of the nine witnesses who testified before the Hearing Board on behalf of the Post Office Department. None of of these witnesses gave any testimony which could be considered substantial evidence to support the revocation order. The substance of the testimony of these witnesses was that certain of the cited items were indelicate and in bad taste. Even as to that, about two thirds of all the items complained of received the unqualified approval of one or more of the Postmaster General's own witnesses (R. 1837).

As to whether the magazine or the cited material were "literature" or "art," not one Post Office witness was even asked the question. The only testimony from Post Office witnesses which bore on the Fourth Condition at all had to to with "public information" but not once was any witness asked the unqualified question of whether the magazine or the cited items came within this category (See R. 1569, 1595, 1635, 1639, 1658-9, 1663, 1703-5, 1724).

Moreover, in appraising the magazine and determining its predominant character it must, of course, be considered as a whole and not by reference to particular items which are selected as objectionable. See *United States* v. *Ulysses*, 72 F. (2d) 705 (C. C. A. 2nd, 1934), *Turner* v. *United States*, 35 F. (2d) 25 (C. C. A. 8th, 1929). But not one of the Post Office witnesses had read all the issues, or even all of any one issue, and most of them had spent only a

few minutes looking at the items which counsel for the Post Office particularly objected to:

(1) Peter Marshall frankly conceded that his examination of the issues of the magazine "was rather cursory" and that he hadn't read all of any article (R. 1584). This witness deplored "the trend of modern times as detrimental to the morals of our nation" (R. 1585) and stated "that womanhood had definitely been lowered by the achievement of equality with men" (R. 1586);

(2) Solomon Metz, despite the fact that he hadn't read all of the articles or even a single article in its entirety (R. 1599, 1624), was ready to accuse Esquire of "preparing the ground for the downfall of our democratic system" (R. 1595). He admitted that he was willing "to pass judgment on a magazine without reading anything in it and looking only at the pictures" (R. 1624);

(3) John W. Rustin admitted that he had not read any of the issues in their entirety (R. 1677) and testified merely that some of the pictures were not information of a public character in the sense that he would not want them available to his 15-year old daughter (R. 1659);

(4) Thomas Verner Moore testified, not that the content of the magazine was not information of a public character, but that in his opinion it was not "proper for dissemination throughout the nation" (R. 1724). The testimony of this witness is a good example of the meaningless character of the evidence which is relied

upon by the Postmaster General. He admitted that he had not read Esquire "all the way through" (R. 1732); that he had not even read all of any one issue (R. 1755). He finally testified:

> "Q. Well, your purpose was to see if you couldn't find anything obscene, wasn't it?
>
> "A. Naturally yes, that is what I was to testify on. I was not testifying on the literary value of the other articles" (R. 1727).

This witness never heard of such authors as Sholem Asch, Theodore Dreiser, John Dos Passos, John Steinbeck, Ernest Hemingway, Maurice Maeterlinck, Maxim Gorky and other well-known Esquire authors (R. 1726). He spent a total of two or three hours examining the material on the basis of which he read a prepared statement on the English obscenity law, long since discredited, and discussed some of the material complained of (R. 1717-1723);

(5) Mrs. Harvey W. Wiley, whose testimony revealed that she had not read a single article or story in its entirety in any one of the 11 issues (R. 1694) and that her study of the magazine was limited to glancing at 6 issues for a total of 12 minutes (R. 1696);

(6) Edwin Holt Hughes, who admitted that he had not read the issues in their entirety and that he spent about 15 minutes looking at the issues (R. 1709);

(7) John Keating Cartwright, who admitted that he had not read any of the articles in their entirety (R. 1559) and had spent about 60 minutes on the 11 issues (R. 1558);

(8) Chester W. Holmes, who testified that he had not read all of the articles (R. 1650) but that his examination was merely to "thumb through casually" (R. 1641); and

(9) Benjamin Karpman, who admitted that he had not read any of the issues in their entirety but had just glanced through them (R. 1548). He testified "I could not commit myself as to the issues as a whole. It may be that 99% is perfect. Again 50% may be good and 50% bad, and then the position might be reversed" (R. 1549).

The foregoing shows that not one of the witnesses who testified for the Post Office as to one or more of the 85 pages complained of had read a single issue of Esquire in its entirety and only a few of them had even read all of the items asserted to be objectionable. Obviously, there can be no evidence to the effect that the primary or predominant content of Esquire is not public information, art or literature from the Post Office witnesses, none of whom had read even a substantial part of the content of a single issue.

Moreover, the Postmaster General's own Hearing Board found no evidence of any non-compliance with the Fourth Condition—not even the single dissenting member. The conclusion is inescapable that the Postmaster General has strained not only in his construction of the statute but also in his construction of the evidence and that the revocation order is completely unsupported by evidence under any construction of the statute.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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